No. 82-1784

In the Supreme Court of the United States

OCTOBER TERM, 1982

TROY STATE UNIVERSITY, ET AL., PETITIONERS

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals applied the correct standard in concluding that the district court should not have dismissed the Commission's complaint because of its failure to comply with discovery orders.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 20-27) is reported at 693 F.2d 1353. The opinion of the district court (Pet. App. 34-35) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 20, 1982, and the petition for rehearing was denied on January 26, 1983. The petition for a writ of certiorari was filed on April 26, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In this action pursuant to Section 17 of the Fair Labor Standards Act, 29 U.S.C. 217, the Equal Employment Opportunity Commission alleges that Troy State University has violated the Equal Pay Act of 1963, 29 U.S.C. 206(d), by discriminatorily paying its female faculty

members at a lower rate than male faculty members performing equal work. The district court dismissed the action as a sanction for the Commission's failure to comply with discovery orders (Pet. App. 36). The court of appeals unanimously reversed the district court's order (Pet. App. 38).

The suit resulted from an adminstrative investigation of the university's pay practices conducted by the Department of Labor (Pet. App. 21).[1] The Labor Department's investigative file includes, *inter alia*, the investigator's Narrative Report, which is a three page document summarizing her investigation of Troy State's pay practices (Pet. App. 21). One section of that report, labeled "Complaint Data," contains the name of a complaining employee and the substance of her complaint (*ibid.*). The investigative file also contains a number of exhibits, including statements furnished by other Troy State employees regarding the university's pay practices (R. 510; Pet. App. 21).

The discovery dispute between the parties began on April 24, 1982, when Troy State served notice of its intent to depose Jerome Rose, the Commission's Regional Attorney (R. 244). The notice of deposition filed with the court included demands that Rose produce documents identifying the persons whom the Department of Labor talked to or interviewed during its investigation (R. 244-246). Troy State also served an interrogatory asking for the name of the complaining party (R. 254).

The Commission responded by filing a motion for a protective order which would, among other things, shield the Commission from having to disclose documents

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[1]When enforcement responsibilities under the Equal Pay Act were transferred to the Commission (Reorg. Plan No. 1 of 1978, 43 Fed. Reg. 19807 (1978); Exec. Order No. 12144, 44 Fed. Reg. 37193 (1979)), the Commission received the Labor Department's investigative file and its recommendation that a suit be filed.

identifying persons who had communicated with either the Commission or the Department of Labor regarding Troy State's equal pay violations (R. 265-266).[2] In its brief in support of its motion, the Commission pointed out (R. 270) that an "informer's privilege" covering employee communications with the federal government regarding Fair Labor Standards Act violations had been recognized by the Fifth Circuit in *Hodgson* v. *Charles Martin Inspectors of Petroleum, Inc.*, 459 F.2d 303 (1972). On May 4, 1981, the district court issued a protective order exempting the Commission from disclosing documents identifying persons who talked with or were interviewed by the Department of Labor or the Commission (Pet. App. 22).

Within a few days after issuance of the protective order, Troy State began taking depositions of 15 of the 34 faculty members identified by the Commission, in response to a Troy State interrogatory, as discriminatees (R. 71, 85, 289, 455). During these depositions, Troy State asked each witness whether she had spoken with or been interviewed by any agent of the Department of Labor or the Commission (R. 289). Believing that this was an attempt to obtain privileged information, the Commission objected and directed the witnesses not to respond to this line of questioning (R. 289).

Troy State thereupon moved for an order overruling the Commission's objections to Troy State's deposition questions, and for an order compelling the Commission to produce the Labor Department investigator's Narrative Report, memoranda written by Commission attorneys concerning this action, and "any other documents included within the investigative file which documents are not covered by the Court's protective order [of May 4, 1981]" (R. 287; Pet.

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[2]The complaining party had specifically requested confidentiality, because she feared retribution (R. 522; cf. *id.* at 525).

App. 22). At the same time, the Commission moved for a protective order to limit Troy State's questioning of deponents, arguing that "[d]efendants are trying to obtain, through individual deponents, the very same information that has already been placed under a protective order" (R. 343; Pet. App. 22).

On May 18, 1981, the district court granted Troy State's motion to overrule the Commission's deposition objections and denied the Commission's motion for a protective order, ruling that "defendants may inquire into whether deponents were contacted or interviewed by the Plaintiff or by the Department of Labor" (R. 364; Pet. App. 22). The court also ordered the Commission to produce the Narrative Report, but denied Troy State's motion to the extent it sought other documents in the investigative file (R. 364).

In response to the May 18 order, the Commission supplied Troy State with the Narrative Report. The Commission deleted the portion of the report which identified the complaining party, since that information was protected from disclosure by the district court's May 4 order (Pet. App. 22; R. 385-387). The Commission also did not produce any of the exhibits in the Department of Labor investigative file, since the May 18 order denied Troy State's request for documents in the investigative file beyond the Narrative Report.[3] The Commission also filed a "Request for Clarification" asking the court to clarify whether the portion of the order relating to deposition questioning allowed Troy State to inquire into the substance of contacts between deponents and the enforcement agencies, or whether Troy State was limited to asking deponents only whether or not they had talked with the Labor Department or the Commission (R. 382). The district court summarily

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[3]Many of these exhibits were interview statements that were also protected from disclosure by the May 4 order, as documents identifying employee informants (Pet. App. 26).

denied the request for clarification, without indicating which interpretation was the correct one (R. 382). Accordingly, at subsequent depositions, the Commission allowed Troy State to question deponents about whether they had been contacted by the Department of Labor, but objected to questions that attempted to elicit information regarding the substance of such contacts.

Troy State then moved to compel production of the "Complaint Data" section of the Narrative Report and all its exhibits or attachments (R. 402; Pet. App. 22), and argued in a "Renewed Motion to Overrule Objections and Request for Sanctions" that inquiry into the substance of communications between deponents and the federal government was allowed by the May 18 order (R. 405).

On June 8, 1981, the district court issued an order to show cause why the Commission's action should not be dismissed for failure to abide by discovery orders of the court (R. 425; Pet. App. 22). The Commission responded, again explaining that defendants were, by questioning individual faculty members, attempting to procure the same information protected by the May 4, 1981 order (R. 456). The Commission's response reiterated Fifth Circuit precedent holding that the Secretary of Labor need not divulge the identity of complainants or informants to employers and stressed that such a rule would be without purpose if the government were powerless to object to deposition interrogation of employees designed to elicit the same information (R. 458-460).

At a telephone conference held by the district court on June 26, Judge Varner stated that Troy State should have been allowed to question employees regarding the substance of their contacts with the Commission or the Department of Labor, and ordered the Commission to supply defendants with all interview statements (including

the identity of persons interviewed) and an unexcised copy of the Narrative Report including exhibits thereto (R. 505, 520; Pet. App. 23).[4]

Between June 26 and June 30, the Commission complied with the oral order by providing the name of the complaining party,[5] all interview statements contained in the investigative file,[6] and those other exhibits from the investigative file that were specifically referred to in the Narrative Report (Pet. App. 23).

On June 30, Troy State moved to dismiss the action on the ground that the Commission had not complied with the court's oral order of June 26, because the Commission had not supplied exhibits in the investigative file that are not specifically referred to in the Narrative Report (R. 504; Pet. App. 25).[7] The Commission's response stated that it did not

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[4]No written order was issued as a result of this conference; nor was the oral ruling recorded. In its motion to dismiss, Troy State subsequently characterized the order as requiring production of "(1) the entire Narrative Report including all exhibits thereto and the 'Complainant Information' Section that had been deleted and (2) all statements or records of interviews taken by DOL during its investigation including specifically statements from female faculty members" (R. 506).

[5]Initially, the Commission did not supply the name of the complaining party discussed in the Narrative Report and moved for permission to keep her name a secret (Pet. App. 23; R. 513; see note 2, *supra*). When it became apparent from statements by Judge Varner threatening a contempt citation that he would not grant that motion, the Commission on June 30 provided her name as well.

[6]Petitioners state (Pet. 8) that after the June 26 conference the Commission "continued to resist" production of employee interview statements and summaries. This is not so. As the record reflects, between June 26 and June 29 Troy State was provided with all interview statements and summaries in the investigative file (Pet. App. 23; R. 506, 514, 520; July 6, 1981 Tr. 20).

[7]The motion also was based on the fact that the Commission had not supplied the name of the complaining party; that information was provided to Troy State on June 30 (see note 5, *supra*).

understand the court's oral order to require production of all the exhibits in the investigative file, and that it had complied with the court's order by supplying the exhibits referred to in the Narrative Report, as well as all interview statements in the investigative file (Pet. App. 23).

A hearing was held on the motion to dismiss on July 6, 1981. Counsel for the Commission explained its interpretation of the June 26 telephone order, relying in part on the fact that the court's May 18 order had denied Troy State's request for documents in the file beyond the Narrative Report. The district court, nonetheless, stated it would dismiss the Commission's case because of its failure to produce all the exhibits in the file (Pet. App. 23).

In a subsequent memorandum requested by the court,[8] the Commission offered two alternatives to dismissal: either that the case be scheduled for trial and if, at trial, Troy State could demonstrate prejudice resulting from the Commission's failure to provide information, the court could limit the Commission's evidence or otherwise alleviate the prejudice; or that the case be scheduled for trial, giving Troy State access to all information in the pre-litigation investigation file (R. 536).

On July 20, the district court issued a memorandum opinion and entered an order dismissing the Commission's case "without prejudice to the rights of the individual faculty members" (Pet. App. 36). The court found that the "record shows Plaintiff's disregard of the Orders of this Court by Plaintiff's persistent blocking of witnesses' responses" (Pet. App. 35), and that the Commission failed to comply with its oral order of June 26 (*ibid.*).

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[8]The court sought the Commission's views on the effect of a dismissal on the right of individual faculty members to file private actions. The memorandum explained the Commission's position that such rights did not survive the filing of this suit. See note 9, *infra*.

The court of appeals reversed, holding that the Commission's "noncompliance stemmed from confusion and a misunderstanding of the court's order, not from bad faith or callous disregard of the order" (Pet. App. 20). After a review of the history of the discovery dispute, the court concluded that the Commission's interpretations of, and responses to the district court's orders were justifiable. The court distinguished this case from its contemporaneously issued decision in *State Exchange Bank* v. *Hartline*, 693 F.2d 1350 (11th Cir. 1982), which affirmed, as within the district court's discretion, a dismissal based upon a litigant's willful refusal to comply with clear discovery orders (Pet. App. 27). In contrast, under the particular circumstances of this case,[9] the court concluded that the district court ought to have considered alternatives to dismissal such as those suggested in the Commission's July 10 memorandum (*ibid.*).

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[9]These circumstances include, in addition to the Commission's good faith, the fact that the undisclosed exhibits consisted almost entirely of information provided by Troy State itself (Pet. App. 27), and the possibility that dismissal would leave injured employees without a remedy (Pet. App. 21). Although the court of appeals found it unnecessary to determine the precise effect of the dismissal on the rights of such employees, its opinion contains a footnote, misquoted at Pet. App. 24 n.2, explaining the basis for the Commission's view that the district court's attempt to preserve such rights was ineffective. The accurate quotation, as contained in the court of appeals footnote, is as follows:

> Section 16(b) of the FLSA provides individual employees with a private right of action to redress violations of the Act. 29 U.S.C. § 216(b). However, the same section explicitly states "the right provided by this subsection to bring an action ... *shall terminate upon the filing of a complaint by the Secretary of Labor in an action under Section 17* in which (1) restraint is sought of any further delay in the payment of ... wages ... owing to such employee under section 6 ... of this Act." See S. Rep. No. 145, 87th Cong., 1st Sess., reprinted in [1961] U.S. Code Cong. & Ad. News 1620, 1658-59 ("[The f]iling of a complaint by the Secretary pursuant to the new authority given him to initiate such injunction suits without formal requests from employees, terminates the

ARGUMENT

Petitioners' claim that the court of appeals applied an incorrect standard in reviewing the district court's dismissal of this action is incorrect, and does not merit further review.

1. Petitioners incorrectly assert (Pet. 10-14, 16) that the court of appeals, in reviewing the district court's dismissal of the Commission's action, abandoned the abuse of discretion standard set forth in *National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642 (1976). But the court of appeals took into full account that "a district court has broad powers under Rule 37, Fed. R. Civ. P., to impose sanctions for a party's failure to abide by discovery orders" (Pet. App. 20). After a thorough review of the record, it nonetheless concluded that the sanction of dismissal was unjustified in this case.

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right of individuals to later file suit for compensation and liquidated damages under 16(b)."); Conf. Rep. No. 327 87th Cong., 1st Sess., reprinted in [1961] U.S. Code and Cong. & Ad News 1706, 1713. The Fifth Circuit has recently considered and analyzed this statutory language in *Donovan* v. *University of Texas at El Paso*, 643 F.2d 1201, 1207 (5th Cir. 1981) where it concluded that "the claims of *all* employees who had not already initiated private actions are consolidated at the time of the filing of the Secretary's suit" and thus "[t]he right of an affected employee to *commence* or become a party plaintiff in a private action terminates"; emphasis in original. See also *Wirtz* v. *Malthor*, 391 F.2d 1, 3 (9th Cir. 1968)) ("[T]he amendment made ... in 1961 withdraws an employee's right to sue for the unpaid wages and overtime compensation due him under the FLSA if the Secretary files an action against the employer ...").

Therefore, since a governmental action has been filed by the Commission under section 17 seeking vindication of the equal pay claims of Troy State faculty members, the statute expressly "withdraws" (*Wirtz* v. *Malthor, supra*) their right to bring a section 16(b) action covering those same claims. Since the statute withdraws the right to sue itself, the rights of faculty members on whose behalf the suit was brought are extinguished without regard to the district court's order that the dismissal be "without prejudice to the rights of individual faculty members" and without regard to the normal rules of res judicata.

Any doubt that the court of appeals applied the abuse of discretion standard in reaching this conclusion is put to rest by its reference (Pet. App. 27) to its decision in *State Exchange Bank* v. *Hartline*, 693 F.2d 1350 (11th Cir. 1982), issued on the same day and also written by Judge Roney.[10] There, the court of appeals affirmed a district court's imposition of sanctions for a party's willful disregard of discovery orders. In its opinion in that case, the court of appeals stressed that "[a]n appellate court reviewing the exercise of th[e] [district court's] power [to impose sanctions] is constrained by the abuse of discretion standard" (693 F.2d at 1352). Thus, the court of appeals clearly applied an abuse of discretion standard in resolving each of these cases, and reached different results solely because of the differences between the two records. Here, the Commission's misunderstanding of court orders was "not * * * wholly unreasonable" (Pet. App. 26-27), whereas the record in *State Exchange Bank* v. *Hartline, supra*, was "replete with numerous unjustified violations of court orders" (693 F.2d at 1352).[11]

2. Since the court of appeals applied the correct standard of review, further review of its conclusion that dismissal of

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[10]Judge Roney and Senior Judge Tuttle served on the panels deciding both this case and *State Exchange Bank*.

[11]This emphasis on the importance of willfulness in determining whether the imposition of the severe sanction of dismissal is an abuse of discretion is entirely consistent with *National Hockey League* v. *Metropolitan Hockey Club, supra*, 427 U.S. at 643, where this Court held that "the District Judge did not abuse his discretion in finding bad faith on the part of the[] respondents, and concluding that the extreme sanction of dismissal was appropriate * * * by reason of respondents' 'flagrant bad faith' and their counsel's 'callous disregard' of their responsibilities." *Cf. Societe International Pour Participations Industrielles et Commerciales, S.A.*, v. *Rogers*, 357 U.S. 197, 212 (1958) (dismissal is inappropriate when noncompliance with a production order is "due to inability, and not to willfulness, bad faith, or any fault of petitioner").

the Commission's suit was inappropriate on this record is unwarranted. That conclusion is, in any event, correct.

The dispute in this case revolved around the discoverability of the identity of the confidential Equal Pay Act complainant and the statements made by Troy State faculty members to a Department of Labor investigator. The Commission believed that documents disclosing these matters were privileged under a body of Fifth Circuit case law recognizing a governmental "informer's privilege" under the Fair Labor Standards Act[12] and that Troy State, in the absence of a showing of specific need, was not entitled to discover them. This view, initially endorsed by the district court in its May 4 order, was the basis for the Commission's refusal to produce the Narrative Report and exhibits in the file containing or describing interview statements, and for its objections to particular deposition questions of Troy State employees designed to obtain that information.[13] After the June 26 telephone conference, however, when the district court in effect retracted the portion of its May 4 order recognizing a governmental privilege, the Commission disclosed the Complaint Data section of the Narrative Report and all exhibits in the file pertaining to employee interviews. Finally, when it appeared at the July 6 hearing that the district court had intended to require the production of the entire investigative file, the Commission

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[12] *Wirtz* v. *Continental Finance & Loan Co. of West End*, 326 F.2d 561 (5th Cir. 1964); *Wirtz* v. *Robinson & Stephens, Inc.*, 368 F.2d 114, 115-116 (5th Cir. 1966); *Hodgson* v. *Charles Martin Inspectors of Petroleum, Inc.*, 459 F.2d 303 (5th Cir. 1972). See also *Usery* v. *Ritter*, 547 F.2d 528, 531 (10th Cir. 1977); *Brennan* v. *Engineered Products, Inc.*, 506 F.2d 299, 302 (8th Cir. 1974); *Wirtz* v. *B.A.C. Steel Products, Inc.*, 312 F.2d 14, 16 (4th Cir. 1962).

[13] The Commission unsuccessfully attempted to obtain clarification of the ambiguous language in the district court's May 18 order relating to its objections to the deposition questions (see pages 4-5, *supra*). When that clarification was not forthcoming, the Commission necessarily relied on its own interpretation of that language.

responded with a July 10 memorandum indicating its willingness to provide all the documents.

In sum, the record here amply justifies the court of appeals' conclusion (Pet. App. 24-26) that the Commission's actions throughout discovery were based on reasonable interpretations of confusing and conflicting orders.[14] Accordingly, in the specific circumstances of this case, the court of appeals properly determined that the district court's dismissal sanction was unjustifiably severe.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[14]Petitioners erroneously contend that the court of appeals' statement that "a specific written order delineating precisely what EEOC needed to provide * * * might have properly set the stage for dismissal" (Pet. App. 25) is an impermissible attempt by the court of appeals to dictate the district court's procedures (Pet. App. 9). Instead, that statement simply indicates that, in this case, the district court's reliance on an unrecorded telephone order was a contributing factor to the Commission's confusion concerning the meaning of the court's orders.

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